

a

TEH POH WAH

v.

SEREMBAN SECURITIES SDN. BHD.

b

COURT OF APPEAL, KUALA LUMPUR
TUAN GOPAL SRI RAM JCA
DATO' SITI NORMA YAAKOB JCA
DATUK MOKHTAR SIDIN J
[CIVIL APPEAL NO: N-02-143-95]
2 FEBRUARY 1996

c

CONTRACT: Estoppel - Contract entered into by husband using wife's name - Whether other party to contract influenced by wife's conduct - Whether wife could assert facts that would contradict her earlier conduct - Whether wife estopped from claiming she had not authorised husband to enter into contract using her name.

d

CIVIL PROCEDURE: Estoppel - Principles and application - Whether a flexible doctrine - When may doctrine operate - 'A shield but not a sword' - Whether maxim still tenable - Whether estoppel limited to defendants alone - Whether plaintiffs may have recourse to estoppel.

e

CIVIL PROCEDURE: Pleadings - Striking out - Whether there were triable issues - Whether suitable for disposal under Court's summary jurisdiction.

f

The appellant's husband ('the husband') had a *mareva* injunction imposed against him. In order for the husband to be able to deal in stocks, the appellant proceeded to open a bank account with a cheque book, signed all the cheques in blank, and handed the whole cheque book to the husband. The husband then 'entered' into a written contract ('the contract') with a stock-broking firm ('the respondent') using the appellant's name. Thenceforth, all of the husband's share-transactions were done in the appellant's name as it was her name which appeared on the contract. Eventually, the share-account with the respondent went bad, and the respondent sued the appellant for the moneys due and owing to it. The appellant delivered a defence and counterclaim. However, the appellant's pleading was struck out upon the respondent's application.

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The appellant then appealed to the instant Court, contending that there were serious issues of fact and law that were plainly unsuitable for determination under the Court's summary jurisdiction. In support, it was submitted that: (i) there was no contractual relationship between the appellant and the respondent, and that the share-account was never operated by the appellant; (ii) the contract was tainted with illegality *ab initio*; and (iii) the trial Judge was wrong in holding the two payments that were made by way of cheques drawn on the appellant's bank account against her.

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Held:

Per Gopal Sri Ram JCA (delivering the judgment of the Court):

- [1] The instant appeal could be satisfactorily resolved by reference to the doctrine of *estoppel*. Through her actions, the appellant would have led a reasonable man to believe that she had given her husband a *carte blanche* to act on her behalf. The undisputed facts reasonably support an inference that the respondent was influenced by the conduct of the appellant to entertain such a belief. It would, therefore, be unjust and inequitable to suffer the appellant to assert facts that would now contradict her earlier conduct. It was no answer for the appellant to say that she had not actually authorised the husband to enter into the contract using her name.
- [2] In testing the triability of the issues raised by the appellant, the trial Judge was entitled to rely, as he did, on the conduct of the appellant.
- [3] There was also nothing illegal about the contract. In the result, this was a plain and obvious case in which the trial Judge was well entitled to exercise, as he did, the summary jurisdiction of the Court to strike out the appellant's pleading.

Per curiam:

- [1] The doctrine of *estoppel* is a flexible one by which the Courts seek to do essential justice between litigating parties. Indeed, the circumstances in which the doctrine may operate are endless. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice.
- [2] It is wrong to apply the maxim that '*estoppel* may be used as a shield but not a sword' to limit the availability of the doctrine to defendants alone. Plaintiffs, too, may have recourse to it.

[Appeal dismissed]

[Appeal from High Court Malaya, Seremban; Civil Suit No: 22-149-92]

[Bahasa Malaysia Translation of Headnotes]

KONTRAK: *Estoppel - Kontrak dimasuki oleh suami menggunakan nama isteri - Samada pihak lain kepada kontrak dipengaruhi oleh kelakuan isteri - Samada isteri boleh menegaskan fakta-fakta yang akan menyangkal kelakuannya yang lebih awal - Samada isteri diestop daripada mendakwa beliau tidak memberi kuasa kepada suami untuk memasuki kontrak menggunakan namanya.*

PROSEDUR SIVIL: *Estoppel - Prinsip-prinsip dan pemakaian - Samada satu doktrin yang mudah diubahsuai - Bilakah doktrin boleh beroperasi - "A shield but not a sword" - Samada maxim masih boleh dipertahankan*

- a* - *Samada estoppel terhadap kepada defendan sahaja - Samada plaintiff mungkin boleh berpaling kepada estoppel.*

PROSEDUR SIVIL: *Pliding-pliding - Pembatalan - Samada terdapat isu-isu yang boleh dibicarakan - Samada sesuai untuk penyelesaian di bawah bidangkuasa terus Mahkamah.*

- b* Suami perayu ('suami tersebut') telah mendapatkan injunksi *mareva* dikenakan terhadap dirinya sendiri. Agar suami tersebut dapat berurusan dalam saham-saham, perayu telah membuka sebuah akaun bank dan mendapatkan buku cek, menandatangani kesemua cek kosong, dan menyerahkan keseluruhan buku cek kepada suami tersebut. Suami tersebut kemudiannya telah 'memasuki' satu kontrak bertulis ('kontrak tersebut') dengan sebuah firma broker saham ('responden tersebut') dengan menggunakan nama perayu. Sejak dari itu, kesemua transaksi saham suami tersebut telah dilakukan atas nama perayu kerana nama beliau yang terdapat pada kontrak tersebut. Akhirnya, akaun saham dengan responden menjadi tidak baik dan responden mendakwa perayu untuk mendapatkan wang yang kena dibayar dan terhutang kepadanya. Perayu tersebut telah menyampaikan pembelaan dan tuntutan balas. Walaubagaimanapun, pliding perayu telah dibatalkan atas permohonan responden.
- c*
- d*
- e* Perayu kemudiannya merayu kepada Mahkamah semasa, menegaskan bahawa terdapatnya isu-isu serius fakta dan undang-undang yang jelasnya tidak sesuai untuk penentuan di bawah bidangkuasa terus Mahkamah. Sebagai sokongan, telah diujahkan bahawa: (i) tidak terdapat perhubungan kontraktual antara perayu dan responden, dan bahawa akaun saham tersebut tidak pernah dikendalikan oleh perayu; (ii) kontrak tersebut tercemar oleh kepenyalahan undang-undang *ab initio*; dan (iii) Hakim perbicaraan salah dalam menahan kedua-dua pembayaran yang telah dibuat melalui cek-cek yang dikeluarkan atas akaun bank perayu terhadapnya.
- f*

Diputuskan:

- g* **Oleh Gopal Sri Ram HMR (menyampaikan penghakiman Mahkamah):**
- h* [1] Rayuan semasa ini boleh diselesaikan dengan cara yang memuaskan melalui rujukan kepada doktrin estoppel. Melalui perbuatan-perbuatannya, perayu telah menyebabkan seseorang mempercayai bahawa beliau telah memberikan suami beliau satu *carte blanche* untuk bertindak bagi pihaknya. Fakta-fakta yang tidak dapat dipertikaikan menyokong satu inferens bahawa responden tersebut adalah dipengaruhi oleh kelakuan perayu demi untuk melayan kepercayaan yang sedemikian. Adalah tidak adil dan tak saksama untuk membenarkan perayu untuk menegaskan fakta-fakta yang kini akan bercanggahan dengan kelakuannya yang lebih awal. Ianya tidak merupakan satu jawapan bagi perayu untuk menyatakan bahawa beliau sebenarnya tidak memberi kebenaran kepada suaminya untuk memasuki kontrak tersebut dengan menggunakan namanya.
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[2] Dalam menguji samada isu-isu yang dibangkitkan oleh perayu boleh dibicarakan, Hakim perbicaraan berhak untuk bergantung, sebagaimana yang telah beliau lakukan, di atas kelakuan perayu tersebut. a

[3] Tidak terdapat apa-apa berhubung dengan kontrak tersebut yang menyalahi undang-undang. Kesudahannya, ini merupakan satu kes yang mudah dan jelas dalam mana Hakim perbicaraan amat berhak untuk melaksanakan, sebagaimana yang telah beliau lakukan, bidangkuasa terus Mahkamah untuk membatalkan pliding perayu. b

Per curiam:

[1] Doktrin estoppel adalah suatu doktrin yang mudah diubahsuai melalui yang mana Mahkamah cuba untuk melaksanakan keadilan yang penting antara pihak-pihak litigasi. Sesungguhnya, keadaan dalam mana doktrin tersebut boleh beroperasi adalah tidak terhad. Ianya merupakan doktrin yang mempunyai kegunaan yang luas dan telah digunakan dalam pelbagai bentuk fakta untuk mencapai keadilan. c

[2] Adalah salah untuk memakai maxim bahawa “estoppel may be used as a shield but not as a sword” bagi menghadkan doktrin itu kepada defendan sahaja. Plaintiff juga boleh berpaling kepadanya. d

[Rayuan ditolak] e

[Rayuan daripada Mahkamah Tinggi Malaya, Seremban; Guaman Sivil No: 22-149-92]

Cases referred to:

Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd. [1995] 4 CLJ 283 (foll) f

Spiro v. Lintern [1973] 3 All ER 319; [1973] 1 WLR 1002 (refd)

For the appellant - Tay Hong Huat (Robert C.C. Low with him); M/s. Cheang & Ariff
For the respondents - D. Krishna (Pretam Singh with him); M/s. Stanley Ponniah, Ng & Soo g

JUDGMENT

Gopal Sri Ram JCA:

The appellant is a married woman. Her husband had had a *mareva* injunction imposed upon him. He obviously wanted to evade the effects of that order. He used his wife to achieve this. She too willingly lent him a hand. h

She opened a bank account with Public Bank and was given a cheque book. She says that she signed all the cheques in blank and handed the whole book to the husband. He then entered into a contract with the respondents, who are, as their name suggests, stock brokers. There was a written agreement; i

a but the appellant claims that she never signed it. She says that she was in Singapore on the date appearing on that document. The address appearing on the agreement is not hers.

b The husband then bought and sold shares through the respondents. Because the appellant's name was on the agreement, all transactions were done in that name. She says that she knew nothing about all this. There is no suggestion that the respondents knew what the husband was up to. When the account with them went bad, they brought an action against the appellant to recover the monies owed to them. It comes to a little more than RM275,000.

c The appellant delivered a defence and counterclaim. She raised several issues in it. The respondents then applied to the Judge to have the appellant's pleading struck out. He acceded to that application. The appellant appealed to us. Her Counsel argued her case with skill and care. But we were not convinced that the Judge was wrong. That is why we dismissed the appeal without calling upon Counsel for the respondent to address us.

d At the forefront of Counsel's submissions was the argument that there were in this case serious issues of fact and law that were plainly unsuitable for resolution under the Court's summary jurisdiction. Counsel however concentrated his attention upon two issues which he said were plainly arguable. They are as follows:

e (1) There was no contractual relationship between the appellant and the respondent. The share account was never operated by the appellant. This is conceded by the respondent. The only evidence against her were two payments made by way of cheques drawn on her account. But in this respect, Counsel relied upon those facts to which we have already made reference, namely, the circumstances surrounding the opening of the bank account and the handing over of the pre-signed cheques to the husband, as negating liability on the appellant's part; and

f (2) The contract was tainted with illegality *ab initio*. Apart from mentioning this point, Counsel made no serious attempt to develop it during argument. We may therefore quite easily dispose of this point by observing that there was nothing illegal about the contract relied upon by the respondent. If Counsel meant that the illegality arose from the husband's plan to evade the *mareva* injunction and to then thumb his nose at the Court, we must point out once again, that there is no suggestion that the respondent entered into the agreement with the object of breaching the terms of the *mareva* injunction.

g We now turn to consider the remaining argument. Counsel pointed out that the learned Judge in the Court below did in fact appreciate that the factual issues raised by the appellant were triable. However, the Judge decided in the respondent's favour basing himself only upon the two payments of which

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we have already made mention. This, it was submitted, was a wrong approach to the case. With respect, we are of the view that the Judge was right and that Counsel is wrong in his argument: *a*

This is a case where the wife, by her actings, would have led a reasonable man to believe that she had given her husband a *carte blanche* to act on her behalf. The undisputed facts reasonably support an inference that the respondent was influenced by the conduct of the appellant to entertain such a belief. She cannot therefore now assert facts that would contradict her earlier conduct. That would be inequitable and therefore unjust. She must face the consequences of the series of events which she set in motion by acceding to the husband's plan. If, it were otherwise, it would amount to our letting her off the hook for assisting in the intentional breach of an order of Court. That would, in our judgment, amount to condoning an attempt to subvert the machinery of justice. We will not tolerate such a result. *b*

In our judgment, this appeal may quite satisfactorily be resolved by reference to the doctrine of estoppel. It is a flexible doctrine by which Courts seek to do essential justice between litigating parties. *d*

In this context we find it sufficient to quote the following passage in the judgment of the Federal Court in *Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd.* [1995] 3 MLJ 331, 344; [1995] 4 CLJ 283 upon the wide scope of the doctrine: *e*

The time has come for this Court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless. *f*

Edgar Joseph Jr J (as he then was) in an illuminating judgment in *Alfred Templeton & Ors v. Low Yat Holdings Sdn. Bhd. & Anor.* [1989] 2 MLJ 202 at p. 244 applied the doctrine in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the Limitation Act 1952. *g*

The doctrine may be applied to enlarge or to reduce the rights or obligations of a party under a contract: *Sarat Chunder Dey v. Gopal Chunder Laha* LR 19 IA 203, *Amalgamated Investment and Property Co. Ltd. (In liquidation) v. Texas Commerce International Bank Ltd* [1982] 1 QB 84; [1981] 3 All ER 577; [1981] 3 WLR 565. It has operated to prevent a litigant from denying the validity of an otherwise invalid trust (see, *Commissioner for Religious Affairs, Trengganu & Ors. v. Tengku Mariam bte Tengku Sri Wa Raja & Anor* [1970] 1 MLJ 222) or the validity of an option in a lease declared by statute to be invalid for want of registration (see, *Taylor Fashions Ltd. v. Liverpool Victoria Friendly Society* [1981] 1 All ER 897; [1981] 2 WLR 576). It has been applied to prevent a litigant from asserting that there was no valid and binding contract between him and his opponent (see, *Waltons Stores' (Interstate) Ltd. v. Maher* [1988] 164 CLR 387) and to create binding obligations where none previously existed (see, *Spiro* *h*

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- a* v. *Lintern* [1973] 3 All ER 319; [1973] 1 WLR 1002). It may operate to bind parties as to the meaning or legal effect of a document or a clause in a contract which they have settled upon (see the *Amalgamated* case) or which one party to the contract has represented or encouraged the other to believe as the true legal effect or meaning: *American Surety Co. of New York v. Calgary Milling Co. Ltd* [1919] 48 DLR 295; *De Tchihatchef v. Salerni Coupling Ltd* [1932] 1 Ch 330; *Taylor Fashions*.

We would add that it is wrong to apply the maxim 'estoppel may be used as a shield but not a sword' as limiting the availability of the doctrine to defendants alone. Plaintiffs too may have recourse to it. The true nature of the doctrine in this context is that stated by Lord Russell of Killowen in *Dawsons Bank v.*

- c* *Nippon Menkwa Kabushiki Kaisha* LR 62 IA 100 at p. 108:
- Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action.

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- It is also wrong to think that the doctrine is confined to cases where a representation of fact has been made or where a party has been encouraged by another to believe in the existence or in the non-existence of a fact. The decisions of the Privy Council in *Sarat Chunder Dey* and the *Calgary Milling Co.* (among others) to which we have referred earlier concerned cases involving representations not of fact but of law.

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- In *Spiro v. Lintern (supra)*, a husband, wishing to sell his house, left it to his wife to make the arrangements to engage estate agents to find a purchaser. But he gave her no authority to sell. The wife, however, went ahead and entered into an agreement to sell the house. The husband did nothing to disclaim the sale. In an action for specific performance, the trial Judge found for the plaintiff, holding that the husband was estopped from proving that the contract had been entered into without his authority.

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- The husband appealed. The English Court of Appeal dismissed the appeal. Russell LJ (as he then was), delivering the judgment of the Court said (at p. 1011 of the report):

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- Mr. Albery has submitted that this is not so because a representation for the purposes of the doctrine of estoppel must be precise and unambiguous: *Low v. Bouverie* [1891] 3 Ch. 82 and *Woodhouse A.C. Israel Cocoa Ltd. S.A. v. Nigerian Produce Marketing Co. Ltd.* [1972] AC 741. Mr Albery says that Mr. Lintern's conduct might equally well have led Mr. Spiro to suppose that Mr. Lintern believed himself to have ratified his wife's action or that Mr Lintern was merely concerned to protect his wife from a claim by Mr Spiro for damages for breach of contract. We feel unable to accept these arguments. As we have already mentioned, Mr. Lintern could not ratify his wife's action in the circumstances of this case because of the rule recognised in *Keighley, Maxsted & Co. v. Durant*

[1901] A.C. 240. It does not lie in Mr. Lintern's mouth to say that the representation implicit in his conduct was equivocal because Mr. Spiro might have thought that Mr. Lintern had done something which in law he could not do. Mr. Lintern could only protect his wife from liability in breach of contract by himself accepting liability on the contract, and this in the circumstances of the present case would involve his representing that the contract had been entered into with his authority. a
b

We are mindful that it would be quite inappropriate to attempt a comparison between the facts of two cases; for one set of facts are no authority for another, no matter how close their resemblance. However, we cannot help but notice that the appellant in the present case is in a position, far worse, or at the very least, analogous to the husband in *Spiro v. Lintern (supra)*. If it was no answer for the husband in that case to say that he had not actually authorised his wife to enter into a contract in his name, we see less reason for holding the contrary in the present case. c

Counsel for the appellant complained that the Judge was wrong to have allowed the case to have turned upon just the one point relating to the payments made. For our part, we are unable to discern any error on the part of the learned Judge for taking the course that he did. He merely relied on the conduct of the appellant when testing the triability of the issues she had raised in her defence. We are satisfied that, on the authorities as they now stand, he was entitled to do that. d
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It is settled law that the summary power to strike out a pleading ought not to be invoked save in plain and obvious cases. There are many cases which recite this proposition and we do not intend to repeat them here. Suffice to say that this is a plain and obvious case in which the Judge was well entitled to exercise the summary power. f

For the reasons given, we formed the view that the appeal was without merit and accordingly dismissed it with costs. The orders of the Judge were affirmed and the deposit paid into Court was ordered to be paid out to the respondents to account of their taxed costs. g

Reported by Gan Peng Chiang

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